



*Jurgen and
the Law*

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JURGEN AND THE LAW

A STATEMENT

*With Exhibits, including the Court's Opinion, and
the Brief for the Defendants on Motion
to Direct an Acquittal*

EDITED BY
GUY HOLT



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JURGEN AND THE LAW
A STATEMENT

A STATEMENT

IF Mr. Cabell had not pre-empted the phrase, the words with which he characterized the tale *Jurgen* might well be used as a title for an account of the tale's adventures with the law. Those adventures, which the matter of this book commemorates no less effectively than it helped to divert them from a less happy outcome, form indeed a comedy of justice: a comedy which, perhaps, aroused more of indignation than of mirth, and which, in its duration, somewhat exceeded the time-limit that a canny dramatist allots himself, but which ended appropriately on a note of justice, and thus showed Mr. Cabell to be not only the maker of a happily descriptive phrase but also somewhat of a prophet.

Well, the comedy of *Jurgen's* suppression is ended. The book is admitted once more to the freedom of the library, and the pawnbroker is again at liberty to wander throughout the universe in search of rationality and fair dealing. And in due course, time and the wisdom of other generations will decide whether the pawnbroker, or the book, or the adventures of either be in any way memorable.

To-day, however, the vicissitudes of *Jurgen*

are of indisputable importance, if only because similar misfortunes may overtake yet other publications. At the moment it appears that the position of literature is less precarious than it has been in the recent past. For the courts, of late, with gratifying accord have failed to detect obscenity in a number of volumes at which professional righteousness has taken offense, and there apparently is cause to hope that legal precedent will dispel the obscurity which so long has surrounded decency—within the meaning of the statute. Yet it is still possible for an incorporated organization to waylay and imprison art: to exercise by accusation a censorship which impermanence makes no less dangerous. Until the difference between the liberty permitted to art and the license forbidden to the vulgar be clearly defined, it remains impossible for any artist to foreknow how fully he may describe and thereby interpret life as he sees it, or for the community to enjoy uninterrupted access to much of the best of ancient and modern literature.

In the pages which follow is printed an argument that expressly defines the test whereby that which is legally permissible and that which is prohibited may be determined. It is, explicitly, an argument in behalf of *Jurgen*, submitted at the trial of the publishers of that book: and it is published in book form, in part because of its intrinsic interest to all readers of Cabell, in part

because it is a valuable addition to the literature of censorship. But here there seems need to preface the argument with a brief history of the *Jurgen* case.

II

It is now a trifle less than three years ago that a Mr. Walter J. Kingsley, a theatrical press agent, sent to the literary editor of a New York newspaper a letter¹ directing attention to James

¹ "James Branch Cabell is making a clean getaway with *Jurgen*, quite the naughtiest book since George Moore began ogling maid-servants in *Mayo*. How come? Dreiser had the law hot after him for *The Genius* and *Hager Revelly* came close to landing Daniel Carson Goodman in Leavenworth, yet these volumes are innocent compared with *Jurgen*, which deftly and knowingly treats in thinly veiled episodes of all the perversities, abnormalities and damn-foolishness of sex. There is an undercurrent of extreme sensuality throughout the book, and once the trick of transposing the key is mastered one can dip into this tepid stream on every page. Cabell has cleansed his bosom of much perilous stuff—a little too much, in fact, for *Jurgen* grows tiresome toward the end—but he has said everything about the mechanics of passion and said it prettily. He has a gift of dulcet English prose, but I like better the men who say things straight out and use gruff Anglo-Saxon monosyllables for the big facts of nature that we are supposed to ignore.

"It is curious how the non-reading public discovered *Jurgen*. A few days after it appeared on the newsstands a male vampire of the films who once bought Stevenson's *Underwoods* in the belief that it was a book of verses hymning a typewriter, began saying up and down Broadway: 'Say, kid, get a book called *Jurgen*. It gets away with murder.'

"This sold the first edition quickly. How do they discover these things?"

WALTER J. KINGSLEY.

Branch Cabell's *Jurgen* as a source of lewd pleasure to the sophisticated and of menace to the moral welfare of Broadway. Hitherto *Jurgen* had found some favor with a few thousands of discriminating readers; it had been advertised—with, its publishers must now admit, a disregard of the value of all pornographic appeal—as literature. Critics, with varying degrees of enthusiasm, had applauded the book as a distinguished addition to American letters; three editions had been printed and the tale promised to enjoy the success to which its wit, its beauty and the profundity of its theme entitled it. No one, until Mr. Kingsley broke silence, had complained of *Jurgen* as an obscene production; no letters of condemnation had been received by the publishers; and the press had failed to suggest that decorum, much less decency, had anywhere been violated.

Mr. Kingsley's letter altered affairs. Immediately a chorus in discussion of *Jurgen* arose. In the newspapers appeared many letters, some in defense of the book, others crying Amen to Mr. Kingsley. Within a week, the merry game of discovering the "key" to *Jurgen* was well under way and a pleasant, rather heated controversy had begun. In the upshot some one sent a clipping of the Kingsley letter to Mr. John S. Sumner, secretary of the New York Society for the Suppression of Vice, calling upon him to do his

duty. Mr. Sumner procured a copy of the book, and, on January 14th, 1920, armed with a warrant, he entered the offices of the publishers, seized the plates and all copies of the book and summoned the publishers to appear in court the following day on a charge of violating section 1141 of the Penal code.²

Thereafter the record is uneventful. Mr. Sumner's complaint³ was duly presented and the

² See page 77.

³ "John S. Sumner, Agent New York Society for the Suppression of Vice, being duly sworn, says: That on the 6th day of January, 1920, and prior, and sworn thereto at the city and county aforesaid Robert M. McBride & Company, a corporation, and Guy Holt, manager of said corporation, Book Department, did at No. 31 East 17th Street in the city and county aforesaid, unlawfully print, utter, publish, manufacture and prepare, and did unlawfully sell and offer to sell and have in their possession with intent to sell a certain offensive, lewd, lascivious and indecent book, in violation of Section 1141 of Penal Code of the State of New York. At the time and place aforesaid, the said Robert M. McBride & Company by and through its officers, agents and employees did print, publish, sell and distribute and on information and belief the said Guy Holt did prepare for publication and cause to be printed, published, sold and distributed a certain book entitled *Jurgen* by one James Branch Cabell, which said book represents and is descriptive of scenes of lewdness and obscenity, and particularly upon pages 56, 57, 58, 59, 61, 63, 64, 67, 80, 84, 86, 89, 92, 93, 98, 99, 100, 102, 104, 105, 106, 107, 108, 114, 120, 124, 125, 127, 128, 134, 135, 142, 144, 148, 149, 150, 152, 153, 154, 155, 156, 157, 158, 161, 162, 163, 164, 165, 166, 167, 168, 170, 171, 174, 175, 176, 177, 186, 196, 197, 198, 199, 200, 203, 206, 207, 211, 228, 229, 236, 237, 238, 239, 241, 242, 271, 272, 275, 286, 321, 340, 342, 343, thereof, and which said book is so obscene, lewd, lascivious and indecent that a minute description of the same would be offensive to the Court and improper to be placed upon the records thereof. Wherefore a fuller description of the same is not set forth in this complaint . . ."

case was called for formal hearing in the magistrate's court on January 23. Upon that date the defendants waived examination and the case was committed for trial in the Court of Special Sessions. The trial was set for March 8, but upon motion of Mr. John Quinn, then Counsel for the Defense, who appeared before Justice Malone, the case was submitted for consideration to the Grand Jury which found an indictment against the publishers ⁴ thereby transferring the case to the Court

**⁴ COURT OF GENERAL SESSIONS OF THE PEACE IN AND
FOR THE COUNTY OF NEW YORK**

PEOPLE OF THE STATE OF NEW YORK:

VS

GUY HOLT, ROBERT M. McBRIDE & Co.,

AND ROBERT M. McBRIDE:

.....

THE GRAND JURY OF THE COUNTY OF NEW YORK by this indictment, accuse Guy Holt, Robert M. McBride & Co. and Robert M. McBride of the crime of UNLAWFULLY POSSESSING AN INDECENT BOOK, committed as follows:

The said Guy Holt, Robert M. McBride & Co., a corporation at all times herein mentioned existing under the laws of the State of New York, and Robert M. McBride, acting together and in concert, in the County of New York aforesaid, on the 14th day of January, 1920, and for a considerable time prior thereto, with intent to sell and show, unlawfully possessed a lewd, lascivious, indecent, obscene and disgusting book entitled JURGEN, a more particular description of which said book would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given; against the form of the statute in such case made and provided, and against the peace of the people of the State of New York, and their dignity.

EDWARD SWANN,
District Attorney.

of General Sessions and enabling the defendants to secure a trial by jury. On May 17, 1920, the publishers pleaded not guilty . . . and, until October 16, 1922, awaited trial.

For, in New York, a "crime wave" was in progress. The courts were crowded with cases which involved other than a possible technical violation of the laws; and, however anxious to rid the docket of the *Jurgen* case, neither the courts nor the District Attorney's office could do other than give precedence to the trials of persons charged with more serious offenses.

On October 16, then, two and one half years after the indictment, the *Jurgen* case was called before Judge Charles C. Nott in the Court of General Sessions. A jury was drawn, the book was submitted in evidence and the people's case was presented. The defendants, through their attorneys, Messrs. Goodbody, Danforth and Glenn, and their counsel, Mr. Garrard Glenn, moved for the direction of a verdict of acquittal, submitting, in behalf of their motion, the brief which is printed hereinafter. The trial was adjourned for three days; and on October 19, 1922, Judge Nott rendered his decision, which also appears hereinafter, and directed the jury to bring in a verdict of acquittal.

III

There ends the record of the tale *Jurgen's* ad-

ventures with the law. The record is, as has been said, uneventful. A book had been impugned, that is all. An author had been vilified and his publishers indicted; certain thousands of readers had been deprived of access to a book which critical opinion had commended to their interest; and author and publishers both had been robbed of the revenues from whatever sale the book might have had during the nearly three years in which it was removed from publication.

True, Mr. Cabell and his book had received much publicity. . . . There is a legend, indeed, that the author of *Jurgen* (and of a dozen other distinguished books) owes much of his present place in letters to the advertising which Mr. Sumner involuntarily accorded him. But one may question that. An examination of the publishers' files seem to show that most of the expressions of admiration for *Jurgen* were repetitions of an enthusiasm expressed before the book's "suppression." And if the enthusiasm and the sympathy of Mr. Cabell's admirers were hearteningly evident, the attacks of his detractors did not flag; and an inestimable number of persons, knowing Mr. Cabell's work only through the recorded opinions of Messrs. Kingsley and Sumner, did certainly condemn him unread and, shuddering, barred their library doors against him. . . . No, Mr. Cabell owes no debt of thanks to the accusers of *Jurgen*.

But all this is by the way. The argument, which appears in the following pages, is of importance not alone because it so ably defends *Jurgen*, but because it defines, more clearly than any other recent document, the present legal status of literature in America in relation to permissible candor in treatment and subject matter. The brief is not in any sense an argument in behalf of unrestricted publication of any matter, however obscene, or indeed in behalf of the publication of obscenity in any form. It is not a denial of the community's right to protect itself from offenses against good taste or against its moral security, or to punish violation of the laws by which the public welfare is safe-guarded.

But one need not be an apologist of license to perceive that there is in a thoughtful consideration of every aspect of life no kinship to indecency; or to perceive that the community cannot, without serious danger to its own cultural development, ignore the distinction between the artist's attempt to create beauty by means of the written word, and the lewd and vulgar outpourings of the pornographer. When these two things are confused by a semi-official organization which is endowed with suppressive powers, even when the courts fail to sustain its accusations, the menace to the community is measurably increased. As a protection against this menace the brief presents, with admirable clarity, a legal test, the validity of

which common sense will readily recognize, for the determination of literature as distinct from obscenity.

GUY HOLT.

New York City,
November 14, 1922.

BRIEF FOR THE DEFENDANTS ON
MOTION TO DIRECT AN
ACQUITTAL

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Court of General Sessions of the Peace
IN AND FOR THE COUNTY OF NEW YORK.

PEOPLE OF THE STATE OF NEW YORK AGAINST GUY HOLT, ROBERT M. Mc- BRIDE & COMPANY and ROBERT M. McBRIDE.	}
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*Brief for Defendants on Motion to Direct an
Acquittal.*

The defendants have moved for a directed acquittal at the close of the People's case. The defendants did not dispute upon the trial the facts which went to make up such case as the People had. That case is that the defendants had in their possession, with intent to sell (they are publishers) a book, "Jurgen", by Mr. James Branch Cabell; and it is contended that the book is lewd and obscene within Section 1141 of the Penal Law.

1—*The Question presented is one of law, which the Court should decide.*

The rule here to be applied is that obtaining in all criminal cases. It is the Court's duty to direct an acquittal when the People's case has failed to show guilt beyond a reasonable doubt.

People v. Gluck (188 N. Y. 167) ;

People v. Smith (84 Misc. 348) ;

Babcock v. People (15 Hun 347).

The indictment is for having in possession with intent to sell, a book offending against Section 1141 of the Penal Law. Since the defendants do not dispute the fact that they did have in their possession the book with intent to sell it, the simple question is whether this book violates the criminal law of this state as expressed in the section of the Penal Law above noted.

While it is sometimes said that this question is one of fact, upon which it is the function of a jury to pass, nevertheless it is clear that, when the defendant raises the question whether the book, as a matter of law, violates the statute, that question is one of law upon which it is the duty of the court to pass.

People v. Brainard (192 App. Div. 816) ;

Halsey v. New York Society (234 N. Y. 1).

"It is true that whether the book offends against this statute is ordinarily a question of

fact for the jury in the first place to determine. It is equally true that upon the review of a conviction for having offended against this provision, it is the duty of this court to examine the publication and see whether the conviction can be sustained under the facts proven. Upon an examination of the book I am satisfied that neither defendant has been guilty of the offense charged in the information, and for this reason the judgment and conviction of the defendant corporation, as well as the defendant Brainard, should be reversed and the information dismissed." (*People v. Brainard*, 192 App. Div. 816, 821.)

2—*The test is the literary as distinct from the pornographic.*

It being a question of law, what are the tests which the courts use in the determination of that question? Those tests, like all the others which the courts have used in the application of criminal law to the case of the individual against whom it is alleged that his act has offended the interests of society, are simple and do not go beyond the actual necessities. Courts in this respect have not forgotten the lessons of history; and of these lessons one which Macaulay's school boy knows is that under our common law dispensation there has not been, since the abolition of the Courts of Star Chamber and of High Commission, nor will there ever be again, such a spirit in our law as

may result, through statute or decision, in the institution of a censorship of the mind in its modes of expression. To use the words of Seabury, *J.*, "it is no part of the duty of courts to exercise a censorship over literary productions" (*St. Hubert Guild v. Quinn*, 64 Misc. 336, 340). And it is in that spirit that common law courts have approached any case such as this from the days when the obscene became cognizable by common law courts in the exercise of a jurisdiction which they took over from the Courts Spiritual. (*Rex v. Curl*, 17 How. St. Trials, 153.) It is true that, for a time, during the intellectual ferment in the early part of the Nineteenth Century, the courts, under the inspiration of Lord Eldon *did* revert to an idea of censorship closely resembling that which Laud advocated in the days of Courts of High Commission; but contemporary opinion of the best minds of the bar, as well as of the public, revolted against this attitude, and the rule thus suggested never became a part of our law.

Seabury, *J.*, has well traced this as follows:

"The early attitude of the courts upon this subject discloses an illiberality of opinion which is not reflected in the recent cases. Perhaps no one was more responsible for this early position than Lord Eldon, who refused to protect by injunction Southey's "Wat Tyler" until the innocent character of the work was proved. *Southey v. Sherwood*, 2 Meriv. 437. He assumed a like position in reference to Byron's

Cain (6 Petersdorff Abr. 558, 559), and expressed a doubt (which he hoped was reasonable) as to the innocent character of Milton's "Paradise Lost". When Dr. Johnson heard of some earlier opinions to the same effect, he is reported to have said: 'They make me think of your judges, not with that respect which I should wish to do.' Judging from the fact that a jury held the publication of Shelley's 'Queen Mab' to be an indictable offense (Moxon's Case, 2 Mod. St. Tr. 356), it seems that jurors were no more liberal than judges in these matters. In commenting upon some of Lord Eldon's judgments on the subject of literary property, Lord Campbell remarked that 'it must have been a strange occupation for a judge who for many years had meddled with nothing more imaginative than an Act of Parliament to determine in what sense the speculations of Adam, Eve, Cain, and Lucifer are to be understood.' 10 Campbell's Lives of the Lord Chancellors, 257." (*St. Hubert Guild v. Quinn*, 64 Misc. 336, 339, 340.)

But the spirit of censorship, thus for a time strangely revived, soon passed. To-day therefore the courts apply simple tests, tests savoring of nothing that involves censorship, tests necessary only for the protection of the public against influences that directly, and without the necessity of argument in demonstrating their effect, bear upon public morals. It requires, therefore, but a few words to describe these tests as they are known to the law of this state to-day.

In the first place, the words of the statute mean exactly what they say and require no subtlety of interpretation. In the words of Cullen, *C. J.*, the statute "is directed against lewd, lascivious and salacious or obscene publications, the tendency of which is to excite lustful and lecherous desire." (*People v. Eastman*, 188 N. Y. 478, 480.) That being true, this simple test excludes others which, however subtle may be the argument in their support, however honest the intention of the people who urge them, inevitably lead to the thing which Seabury, *J.*, has said,—but which everybody would know even if it had not been said by this particular Judge,—is outside the purview of criminal law as administered in English-speaking countries,—censorship by indictment.

In the second place this statute does not forbid publication of the polemical. "It seems to be", says Andrews, *J.*, of the book under review by the Court of Appeals, "largely a protest against what the author, we believe mistakenly, regards as the prudery of newspaper criticism." (*Halsey v. New York Society*, 234 N. Y. 1, 4.) The prosecutor, and indeed the court itself, may not agree with what the book may advocate, may not take the sentiment which it expresses, but the book cannot be condemned for that. "Differ as men may as to the views of Voltaire on many questions", said Seabury, *J.*, in the case which we have already cited, "his works cannot be burned by the public hangman

under the guise of a section of our Penal Code." (*St. Hubert's Guild v. Quinn*, 64 Misc. 336, 342.) We need not, however, pursue this subject further, because *People v. Eastman* (188 N. Y. 478) stands as a monument to the proposition under discussion. One has only to read the article for which an indictment was brought (it is repeated verbatim in the dissenting opinion of O'Brien, J., at pp. 482-484) to realize that its nature was such as to excite in the minds of thousands of our best citizens feelings which it is impossible adequately to describe. Yet, disregarding the decision of the English courts in *Regina v. Hicklin* (L. B. 3 Q. B. 369), where a precisely similar book was held indictable, our Court of Appeals sustained a demurrer to an indictment which set forth the article in question.

Nor is it necessary, in order to protect a book from indictment, that it teach a moral lesson.

People v. Brainard (192 App. Div. 816);
Halsey v. N. Y. Society (234 N. Y. 1).

The Appellate Division of this Department has well borne out this proposition when, in reversing a judgment of conviction, it said:

"I can see no useful purpose in the publication of the book. I cannot agree that it has any moral lesson to teach. Its publication might well be prohibited as a recital of life in the underworld, as is prohibited books containing recitals of crimes." (*People v. Brainard*, 192 App. Div. 816, 821.)

In short, this statute was not intended, as the Court of Appeals has said in one of the cases above cited, "to regulate manners". (*People v. Eastman*, 188 N. Y. 478, 480.)

What then do these tests of the law come to? The courts in their own words have told us that. If the book has literary merit, then it is not within the condemnation of the statute.

O'Brien, J.:

"It is very difficult to see upon what theory these world-renowned classics can be regarded as specimens of that pornographic literature which it is the office of the Society for the Suppression of Vice to suppress, or how they can come under any stronger condemnation than that high standard literature which consists of the works of Shakespeare, of Chaucer, of Laurence Sterne, and of other great English writers, without making reference to many parts of the Old Testament Scriptures, which are to be found in almost every household in the land. The very artistic character, the high qualities of style, the absence of those glaring and crude pictures, scenes, and descriptions which affect the common and vulgar mind, make a place for books of the character in question, entirely apart from such gross and obscene writings as it is the duty of the public authorities to suppress. It would be quite as unjustifiable to condemn the writings of Shakespeare and Chaucer and Laurence Sterne, the early English Novelists, the playwrights of the Restoration, and the dramatic literature which has so

much enriched the English language, as to place an interdict upon these volumes, which have received the admiration of literary men for so many years." (*Re Worthington Co.*, 30 N. Y. Supp. 361, 362; 24 L. R. A. 110.)

Andrews, J.:

"With the author's felicitous style, it contains passages of purity and beauty * * * Here is the work of a great author, written in admirable style, which has become a part of classical literature." (*Halsey v. N. Y. Society*, 234 N. Y. 1, 4, 6.)

Seabury, J.:

"Offensive as some of the phrases of this book undoubtedly are to the taste of our day, yet I do not think we can declare a contract for its sale illegal on this account." (*St. Hubert Guild v. Quinn*, 64 Misc. 336, 338.)

Literature, to use the phrase of Matthew Arnold, is nothing more nor less than a criticism of life, of the relation of man to the universe and to his fellow man. When any phase of that subject is discussed, then you have literature, though you may not agree with the point of view which the author advocates. Thus, in one of the cases from which we have already frequently cited, Seabury, J., points out the violent differences of opinion that arose and still exist, regarding Voltaire's "Maid of Orleans":

“Frederick the Great admired it and paid it the doubtful compliment of imitation, and Condorcet regarded it only as an attack upon hypocrisy and superstition. Less prejudiced critics than these condemn it with severity, and even admirers of Voltaire regret that there are passages in it which have dimmed the fame of its author.” (*St. Hubert Guild v. Quinn*, 64 Misc. 336, 338.)

For that very reason the final test of the law, as recognized by the courts of this State, is simple. It is only whether the thing is literature as distinct from a simple effort to portray the obscene.

It is quite true that scattered here and there in the books, are to be found expressions to the effect that a thing may be literature and yet be within the statute. The argument is that there are two classes in the community, the intelligent and the ignorant. Something may be literature and the intelligent will so appreciate it, but the statute is to protect the other class—the ones who ought not to be entrusted with books at all. The *sequitur* is that a book is unlawful unless it can be read by the ignorant, by the child incapable of appreciating the sustained thought. To this effect will one find expressions in *U. S. v. Clark* (38 Fed. 734), and the General Term decision in *People v. Muller* (32 Hun, 209). But one will never find that the Court of Appeals of this state has spoken to that effect, or has made that classification. It

did not do so in affirming the judgment in *People v. Muller* (96 N. Y. 408), which, by the way, dealt with a picture and not a book; and it certainly did not do so when it expressed itself in *People v. Eastman* (188 N. Y. 478) or in *Halsey v. N. Y. Society* (234 N. Y. 1). In *People v. Eastman*, as we have said, the article was undoubtedly such as should not fall into the hands of a child; and in *Halsey v. N. Y. Society* the majority opinion frankly admits that there are paragraphs in the book which, standing alone, are undoubtedly indecent. Nor has the successor of the General Term, the Appellate Division, spoken to that effect. Its decision in *People v. Brainard* (192 App. Div. 816) certainly does not bear out such interpretation. Nor have judges, sitting at Special or Trial Term, or in the Appellate Term, so expressed themselves. O'Brien, J., certainly made no such distinction in *Matter of Worthington* (30 N. Y. Supp. 363; 24 L. R. A. 110). Nor did Seabury, J., make any such distinction in *St. Hubert Guild v. Quinn* (64 Misc. 336). If that were the law of this state, we say, with all sincerity, that literature would have to be reduced to the level of the movies; the stage would be reduced to the rendition of charades, thousands of plays being barred, ranging from those of which Shakespeare was the craftsman, to the productions of Somerset Maugham; Swinburne's Chorus in "Atalanta in Calydon" would be on the index, and Keats would

be barred from any public library because of "Endymion" and "The Eve of St. Agnes". Nay, Sir Walter Scott's collection of border minstrelsy would be barred because it contains those two exquisite ballads, "The Eve of St. John" and "Clerk Saunders and May Margaret"; and, incidentally, the "Oxford Book of English Verse" should be burned because it contains reprints of all these things. But it is useless to pursue this subject, for, to use the favorite phrase of the late Chief Justice White, "to state the argument is to answer it". No, the test is whether the thing is literary; whether it is a criticism of life; whether that effort is apparent in the book.

3—In applying this test, all reasonable doubt should be resolved in favor of the book.

The courts, to repeat, apply the simple test of literature as distinct from the mere portrayal of the obscene. And in getting at whether a thing is literature, they are not disposed to substitute their judgment for that of others who speak of the book in the spirit of sincerity; nor are they disposed to tip the scales, even if people of that sort differ in their conclusions. "We have quoted", says Andrews, *J.*, in the latest case, "estimates of the book as showing the manner in which it affects different minds. The conflict among the members of this court itself points a finger at the dangers

of a censorship entrusted to men of one profession, of like education and similar surroundings." (*Halsey v. N. Y. Society*, 234 N. Y. 1, 6.) Likewise, the opinions in *St. Hubert's Guild v. Quinn* (64 Misc. 336), and *Matter of Worthington* (30 N. Y. Supp. 363; 24 L. R. A. 110) refer to various criticisms of the books involved, as do the opinions of Magistrate Simpson and Magistrate Oberwager in the very recent (and still unreported) cases of *People v. Seltzer* and *People v. Salsberg and Boni & Liveright*. In all of those cases the criticisms were contained in book or magazine form, which were available to the Court. In the present case the various criticisms of the book here involved are not available in such form, and consequently we are submitting herewith copies of letters and newspaper clippings containing the opinions of many competent critics concerning that book, which we respectfully ask this Court to consider in rendering its decision upon this motion.

4—In judging the book by the standards above indicated, it must be read as a whole, and, on that basis, it must be upheld even though it may contain portions which would not stand the test if isolated.

From what has already been said another conclusion follows:—The book is to be judged not by isolated passages in it, but by the whole book.

Peculiarly is this true in the present case, where the book at large is indicted, not parts of it, as was the case when complaint was made in Special Sessions, but all of it without reference to any particular part. That, when a book is indicted as a whole, no judgment can be passed upon it which is not based upon a reading of the whole, with the necessary test of correlation which this entails, would seem manifest on its face. But in view of certain expressions which judicially fell in the federal case of *U. S. v. Bennett* (16 Blatchf. 338; Fed. Cs. No. 14,571), it is just as well to refer to the fact that, both in England and in this State, the test is the whole book, not isolated parts to which it may please the prosecutor to point an accusing finger.

Halsey v. N. Y. Society (234 N. Y. 1);

Fitzpatrick's Case (31 How. St. Tr. 1170, 1186).

St. Hubert's Guild v. Quinn (64 Misc. 336).

"The judgment of the court below is based upon a few passages in each of these works, and these passages have been held to be of such a character as to invalidate the contract upon which the action has been brought. These few passages furnish no criterion by which the legality of the consideration of the contract can be determined. That some of these passages, judged by the standard of our day, mar rather than enhance the value of these

books can be admitted without condemning the contract for the sale of the books as illegal. The same criticism has been directed against many of the classics of antiquity and against the works of some of our greatest writers from Chaucer to Walt Whitman, without being regarded as sufficient to invalidate contracts for the sale or publication of their works."

St. Hubert Guild v. Quinn (64 Misc. 336, 339).

"No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio or even from the Bible. The book, however, must be considered broadly as a whole."

Halsey v. N. Y. Society (234 N. Y. 1, 4).

The proposition thus laid down is nothing but common sense,—the common sense which was expressed, over a century ago, in a trial in the Irish King's Bench, for the publication of an alleged libel:

"Mr. Burrowes.—My lords, I beg to know, whether the Court be of opinion, that without any averment respecting other passages in the book, the counsel for the crown are entitled to read them.

Mr. Justice Day.—In order to show the *quo animo*, they may read those other passages.

Mr. Justice Osborne.—I think they have such right, as evidence of the intention.

Lord Chief Justice Downes.—And the defendant, if he thinks fit, may read all the rest of the book.” (*Fitzpatrick’s Case*, 31 Hows. St. Tr. 1170, 1186.)

It follows that if the book must be taken as a whole, then it cannot be condemned piecemeal. No part can be read without a mind to its relation to the whole. In the latest case on the subject, Andrews, *J.*, speaking for the majority of the court, twice concedes that, taken by themselves, certain parts of the book are not to be justified :

“It contains many paragraphs, however, which taken by themselves are undoubtedly vulgar and indecent. * * * On the other hand, it *does* contain indecent paragraphs.” *Halsey v. N. Y. Society* (234 N. Y. 1, 4, 6).

Yet the book was upheld for all that, both because, in the words which the court adopted from the late Professor Wells of Sewanee, the author there involved “helps us over the instinctive repulsion that we feel for the situation”, and because he excites “a purely artistic interest”, etc. (*Halsey v. N. Y. Society*, 234 N. Y. 1, 5.)

5—The book, read as a whole, sustains the test of the law.

The following has been prepared by counsel, with full appreciation of the fact that the book un-

der review must, in the last analysis, speak for itself, and that every book makes its different impression on each mind that it reaches. The only possible aid to reflection which this writing can constitute therefore, lies in such suggestion as it fairly may convey, that Mr. Cabell's book is literature, in the accepted sense of that term, which is, as the foregoing brief shows, the legal sense as well. It presents a theme and its object is to stimulate reflection.

The book in question is a criticism of life. It treats with satire certain of the thoughts so current among us. It is Matthew Arnold and Carlyle in different guise. But the guise adopted is not new or novel. In the Sixteenth Century Erasmus put forth his comments on the ruling ideas of his time by writing a book "In Praise of Folly". Mr. Cabell has adopted the same method of treatment. To his book can be applied the words which Professor Wells spoke of a book which our Court of Appeals has recently held *not* to be within the condemnation of the statute invoked in the present case: "With a springboard of fact in the seventeenth century to start from, he * * * transfers the adventures from the real world to a sort of forest of Arden, where the Rosalind of Shakespeare might meet a Watteau shepherdess and a melancholy Jacques." (*Halsey v. N. Y. Society*, 234 N. Y. 1, 5.)

But that is not the only motive of the book. It

deals also with aspirations for the unattainable, aspirations which it falls to the lot of some men to feel,—aspirations whose portrayal finds expression in books ranging from Goethe's "Faust" to Sinclair Lewis's "Babbitt". These are things which, to use the words of Magistrate Simpson in the recent (and still unreported) case of *People v. Seltzer*, are not "naturally calculated to excite in the susceptible impure imaginations". And if we want a moral lesson, we have it, because these desires are shown to be useless. *The conventional cannot be escaped by fleeing to sin, for wickedness itself is conventional.*

And may we observe in passing that the author, Mr. Cabell, is no radical? He makes no plea for reform by way of sociological experiment. Indeed, as expressed in "Beyond Life", his contempt for sociology has been condemned by one of the apostles of the new Reign of Science and a lecturer in the Rand School (Robinson, "The Mind in the Making", page 208). "What we want", said Mr. Gradgrind, "are facts". Mr. Cabell's book now under attack deals with things not within the spectrum of the Gradgrind School,—eternal things which continue whether the world happens to be of the "New Philosophy" mode of thinking, or to have returned to the Age of Faith. How well he succeeds with what he has undertaken is quite another matter; in law it is sufficient that he has assumed the task. And with this in mind, the following

undertakes to tell what one reader, at least, may think that "*Jurgen*" is about.

Jurgen's name is "derived from jargon, a confused chattering such as birds give forth at sunrise" (183).^{*} He is a pawnbroker, and he lives in Poictesme, but it might just as well be Kenauquhair. In his youth he had been in love with a Lady Dorothy; at forty-four we find him a pawnbroker, settled down to business, with a wife who has all the virtues of the good wife; somewhat henpecked, longing, like Sinclair Lewis' Babbitt, for he knows not what. He has not the culture of Faust, he is not a Ph.D.; but, like the doctor of Leipzig whose venturings as set forth in legend attracted Marlowe and then Goethe, Jurgen yearns for "the distant land", where he shall be able "to grasp infinite nature". He thinks that he is a "monstrous clever fellow";—so did Faust, the learned doctor,—in the end he reaches his salvation through a return to the routine from whence he came. Like Faust he assumes to unravel a tangled knot. Life is a riddle, nature is a mystery, justice has an indefinable basis. The learned man in Goethe's poem seeks to find out why these things are so; Mr. Cabell's hero is a man of ordinary station, but he, too, pursues the quest.

Jurgen passes from his routine of life, as Faust does, through communion with spirits that partake

^{*} The numerals in parentheses refer to the pages.

of the power of darkness. It all starts with one night when, on his way home from a day of trafficking in his shop, Jurgen passes a Cistercian monk who, having stumbled over a stone, is cursing the devil that had placed it there. "Fie, brother", says this wordly wise, this all sufficient Jurgen, "have not the devils enough to bear as it is?" (1) This attracts the attention of an earth spirit, one Koshchei, "who made things as they are".

For that reason this spirit, Koshchei, has his limitations. To him love is impossible—not carnal love, but the love of God, such love as never enters into Hell (257); such love as Jurgen's grandmother, instructed by the priest, has for God (299, 302). Also to this earth spirit, Koshchei, is pride impossible (303). Of heavenly love the earth spirit cannot conceive, because he "made things as they are, and day and night he contemplates things as they are". "How then", says God Himself, "can Koshchei love anything?" (303). Pride, as the philosophical Satan tells Jurgen, is impossible to whoever it was that made things as they are, because he has to look at them, having nothing else to look at, so how can he be proud? (257). Almost, having in mind a certain treatise, *De Civitate Dei*, we can imagine St. Augustine speaking. The things of this world, the things as they are, are not to be loved, and he who made them, assuredly not the real God, finds love foreign to his breast.

Anyhow, this Koshchei, "monstrously pleased" with Jurgen's defense of the devils against the Cistercian monk, puts himself in Jurgen's way. Appearing to the hero in the shape of a small black gentleman, the earth spirit promises Jurgen a reward (10-11).

What that reward is to be soon develops. Arriving home, Jurgen finds his wife has vanished. She has gone to a cave, of evil magic, across Ameran Heath. On Walpurgis night, that night renowned in the calendar of demonology, Jurgen follows her there; but first, at her bidding he must remove from his neck a cross which had hung there, the gift of his dead mother (13).

Then comes a medley of classic, of Russian, and of Norse mythology. Jurgen finds in the cave a centaur, who gives him a Nessus-shirt (16)—"an old poet, loaned at once a young man's body and the Centaur's shirt" (131)—the young man's body which Faust desired, but the Nessus-shirt which even Hercules could not wear for long. Jurgen is now off for his tour of the infinite.

And yet it is not the real Jurgen who makes this voyage. The real Jurgen, where is he? There are, in fact, many Jurgens. One of these is a little boy in Heaven. "That boy", says God, "is here with me as you yourself have seen. And today there is nothing remaining of him anywhere in the man that is Jurgen" (297). Another Jurgen is "a young man barely come of age" (23) who

had loved the young girl Dorothy, and who sees the Jurgen of today only "as one might see the face of a dead man drowned in muddy water" (31). Then there is the Jurgen of today, the Jurgen who "retains his shop and a fair line of business", the Jurgen whose *confiteor* is that Koshchei, the earth spirit "who made things as they are", has dealt with him very justly. "And probably his methods are everything they should be; certainly I cannot go so far as to say that they are wrong; but still, at the same time—" (368). And, separate from all these Jurgens, the little boy who loved God, the youth who cherished the normal things of youth, and the Jurgen of middle age who worships things as they are, is yet another Jurgen—the Faust-Jurgen, who, by favor of the powers of darkness, goes careering on his voyage of the world of fancy, the world of vision, the world of regrets, the world of disillusion.

The sequence of his adventures may easily be traced.

In the first episode Jurgen visits a garden between dawn and sunrise. It is a garden where "each man that has ever lived has sojourned for a little while, with no company save his illusions" (20). And the spirit of it all is shown forth in the people whom he first encounters. For they are a small boy and a girl who forever walk in the glaze of a mustard jar (19),—forever, that is, like the youth and the maid on the Grecian urn which

drew the immortal gaze of Keats. The glance sweeps forward soon, however, and hence presently in this garden of memory Jurgen meets the girl Dorothy, meets her and talks with her (24-33). When she had gone all was gone and so, when the sun rose, it was simply "another workday" (34). The Philistine spirit blew upon the garden, it was to be remodelled and all the gold was to be rubbed away (36-7).

Then follows a visit to a character of many names, but always the same. Jurgen calls her Sereda, after the manner of Russian mythology, but she corresponds with the Roman Cybele, the Goddess of Earth (210, 316) and in the Norse she is called *Æsred* (176-7). Goddess of Earth, she takes the color out of all things. The Fates spin the glowing threads and weave them into curious patterns; but when she is done with them there is no more color, beauty or strangeness apparent "than in so many dishrags" (40), for she bleaches where others have colored. Naturally enough she refers Jurgen back to Koshchei, the spirit who made things as they are. Once more, through his intervention, Jurgen meets Dorothy. For in his attempt to answer life's riddle, he must perforce return to the girl whom he had loved while young. If but they two could be together again in youth, would not the failures of his life, the disappointments of the middle years, be but as things that never had happened? (See 55.)

While the glamour still holds its spell, to Jurgen this is the young Dorothy, the girl who has not yet married; and so, on the moonlit ramp of her father's castle they talk of many things as young lovers would. To them soon comes the girl's future husband, but to Jurgen the magic makes it the appearance simply of a rival suitor; and, the magic having not yet exhausted its force, the conventional will have it that, in the words of the old stage directions, "they fight, and the rival is slain". Then the conqueror turns to the lady, but dawn is coming and the magic is spent. Jurgen finds that this is not the Dorothy whom he had seen in the garden between dawn and sunrise (47-60). She is now repulsive, and he repels her. It is meet and right, therefore, that the next place to which Jurgen comes is a cave where are the bodies of many whom he had formerly known (60-65).

Winding his way through this cave he comes to Guenevere. She is held by the power of a giant; and from that giant does Jurgen rescue her (66-78).

Guenevere, of course, is the lady, charming but of errant fancy, to whom the chronicles *Morte d'Arthur* and *Mabinogion* were devoted, and of whose vagaries speak Tennyson's "*Idyls of the King*." At this time her marriage to Arthur has been arranged, and Lancelot is coming as his master's envoy to arrange the details of the wedding.

In the end Lancelot captures the heart of Guenevere (147) but, meanwhile her inclinations have their way with Jurgen. For Jurgen abides with her father in the latter's city of Cameliard, which, of course, is but another name for Camelot (78-146). It is, to use the words of our time, a house party; and, like many house parties, it brings forth various events. To the guest Jurgen it befalls to do things ancient and modern, to rescue a princess from a giant, after the fashion of Sir Thomas Malory (82-3), to converse with ghosts in a haunted bed room (145-9) and to carry on with the fickle Guenevere, whose outstanding trait is "her innocence, combined with a certain moral obtuseness" (108). Her worldlywise father learns of the affair, talks it over with Jurgen, and reminds him of the duty apparent in the circumstances, that, if necessary, Jurgen should lie like a gentleman (93). The matter, however, comes to nothing, for the time of Guenevere's marriage to Arthur is at hand. So she and Jurgen part, she with her mind already full of Lancelot (147) and Jurgen being taken with the charms of a new person of the play, of whom presently. In short, Jurgen leaves Guenevere where Tennyson takes her up, the stage being thus cleared for the drama of Lancelot.

Jurgen leaves Cameliard with one who is called Anaitis (147). But even as Guenevere typifies innocence combined with obtuseness (108) Anaitis

is the personification of a capital sin. Like the earth goddess Sereda, known also to men as Cybele and Æsred (of whom *supra*) this Anaitis bears different names in different places. But always she is the same. In the Arthurian legend she is the Lady of the Lake (109), in classic lands she was Venus, on Eastern soil she was Ashtoreth. She serves the moon (150), she is the sun's daughter (173); and in all lands from Paphos to Babylon do men rear temples in her honor (341-3). But the breath of evil nevertheless goes forth from her; and in her train follows Alecto, whose quality is retribution (178).

With this Venus, this Anaitis in her land of Cocaigne, Jurgen lives for a time. But he is not the only guest of whom legend bears record, not the only visitor of whom contemporary literature and art have spoken. Mr. Cabell, however, preserving that balance of humor which always in this book is kept level, has given this situation a new color. Tannhäuser is tempted to return to the Venusberg; Jurgen leaves Anaitis with never a glance behind.

But while he stays there, things of black magic happen. Nor is that strange. Anyone familiar with the legend embodied in "Tannhäuser" might expect to find that all things abhorred by Christians are practiced in the land of Venus, the Cocaigne of Anaitis.

And so we are able truly to understand the epi-

sode, occurring while Jurgen abides in this country of Cocaigue, to which so much attention has been directed by Mr. Sumner (chap. 22, pp. 151-158). This Moon Goddess (159) "who ruled not merely in Cocaigue but furtively swayed the tides of life everywhere the Moon keeps any power over tides" (159) had but one mission, "to divert and to turn aside and deflect" (159). Goethe puts into the mouth of Mephistopheles the tremendous words, "I am the spirit that always denies". The episode in the present book simply shows forth the action of the spirit that denies, for to deflect is to deny. What occurs in the passage to which Mr. Sumner objects is nothing but a repetition of the mediaeval practice of the Black Mass, the Devil's Mass. It is certainly not against the dictates of literature to publish what the author conceives as a detail of the mysterious Black Mass; for if so then the novel, "Black Diamonds", by the famous Hungarian novelist of a generation ago, Maurice Jokai, would never have been allowed in translation. And that the ceremony in question was a Black Mass is clear after we read, not merely the words describing the ceremony itself, but the references to it that follow.

In the inner sanctuary we find a toad nailed to a cross (157). The incident occurred "on the eve of the Nativity of St. John the Baptist" (159), in other words Midsummer Night's Eve, at which time, according to mediaeval tradition, the powers of

darkness are allowed abroad.* Let us remember that in the country of Venus "the Church is not Christian", and the law is "do that which seems good to you" (161). The very goddess herself was "created by perversity, and everyone knows that it is the part of piety to worship one's creator in fashions acceptable to that creator" (165). That goddess, whose mission it was to divert, to deny, naturally enjoyed "the ceremony of God-baiting" as Jurgen calls it (157). Tannhäuser abode in the Venusberg, and nobody has dreamed of forbidding Wagner's opera based on that. Jurgen lived in precisely the same place, but simply described with more cynicism. Really, we have nothing but "Tannhäuser" as it would have been written by Heine, if he had happened to take up the German legend in the spirit of his own cynical wit. Wagner took it seriously, and Mr. Cabell does not take it seriously; that is all the difference.

It will probably be advisable at this point to explain the details of the lance and the veil as used in this Devil's Mass. The explanation, fortunately, can be shortly put. The lance was a real lance, which the hooded man handed to Jurgen (153). The veil was also real. It hung before the *adytum* (Gr.=inner part of a temple) and in-

* (Cf. the old Scottish Border legend, "The Eve of St. John", to be found in Scott's "Minstrelsy of the Scottish Border"; and Compton Mackenzie's latest novel, "Altar Steps".)

side this adytum, beyond the veil, was the cross with a toad nailed upon it (157). The tip of the lance was red (154) and with it the veil was pierced that concealed the cross, but upon the cross hung the disgusting figure of a toad. The whole thing was, as Jurgen called it on the spot, a piece of "God-baiting", a mockery, after the manner of the mediaeval necromancers, of the mystery of the Passion of the Cross, of the lance that pierced a sacred Side, of the veil of the Temple that broke with a certain event which changed all the tides of history.

Taking it by itself this incident is not obscene or lewd; for mockery of sacred belief does not, as matter of law, fall into that class. An attack on religious belief cannot be indictable as an obscenity under Section 1141 of the Penal Code; if prosecuted, it must be indicted as a libel (*People v. Eastman*, 188 N. Y. 478). *But we will not allow the defendants, nor Mr. Cabell, the author, to remain for a moment solely under that protection. This book puts forth the attack upon the Christian belief, not to support the attack, but to deride the attack itself.* It is a matter of common observation that *infidelity itself partakes of a religious fervor, and it is of that fervor that Jurgen makes fun.* "Well, well!" says Jurgen, "but you are a little old fashioned, with all these equivocal mummeries" (157). Being "skeptical" (165) he denies that "death is going to end all for him" (171). And so Cocaigue "does not satisfy him" (172), he ex-

presses his discontent at length (163-170) until Anaitis, in wrath, calls him "irreverent" (167), and that leads to their parting.

Surely that is a moral ending! Jurgen leaves Anaitis, his heart and mind not going along with the beliefs and practices of a goddess who enjoys every "far-fetched frolic of heathenry", and who goes forth into the world to tempt people like St. Simeon Stylites and the hermits of the Thebaid (176). If it is unlawful to say that in print, then we must suppress Flaubert's "Temptation of St. Anthony", and we should certainly never permit "Tannhäuser" or "Thais" to be sung at the Metropolitan.

Then what survives all of this? What indeed but the words of one of the goddess' friends, the Master Philologist, who says: "The Jewish mob spoke louder than He Whom they crucified. But the Word endures" (182). Jurgen, in short, tires of this place, a place where "it appears that their notion of felicity is to dwell eternally in a glorified brothel" (187).

He is now looking for Helen of Troy. Of course it is not criminal to think about her, since otherwise the second part of Faust should not be allowed in print, nor should Tennyson's "Dream of Fair Women". So it is lawful for Jurgen to look for her, and he does look. But on his way comes another episode.

In the domain of Leuke (192) he meets a hama-

dryad named Chloris. Leuke is the land of conventionality where nobody ever does anything except what he has been accustomed to do, and would never dream of doing a thing which nobody ever heard of doing (203-204). Consequently the wisest person among them is the god Silenus, the god of drunkenness, and he is always drunk in order to escape the conventional (208-9). That of course is not right, but the indictment is not drawn under the Volstead Law. Jurgen stops among these people and marries a little hamadryad, who is all that a wife should be (215) and who puts up a lunch for him when he goes for a walk (215). So conventional is Leuke, be it noted, that even a stroll is out of keeping. In this country of conventionality the people have never taken a holiday, nobody ever having heard of such a thing (206). It is the Utopia of the Podsnaps of Dickens' time, of the Rotarians of our own. But his life in this happy place, where nothing out of the ordinary ought in nature's course to happen, does not last long. War is threatened by the Philistines.

Be it observed, from what has already been said, that the Philistines and the people of Leuke were made by the same creator, the power that made things as they are, and consequently it does not much matter who will win, because all it will amount to is that "dullness will conquer dullness" (209). Yet in the matter of dullness the balance is with the Philistines. Fire is their means of sacrifice,

not because of the glow, but because it ends in ashes, and the gray of ashes is their favorite color (230). They are Realists (231) and they believe that there is no art except it "teach something" (241). Their high priests claim to have read every book ever written, and denounce those who doubt the assertion (244). Knowing everything, believing in nothing that is not practical, they have a summary way of dealing with those who presume to disagree. All such recalcitrants are sent to Hell, "relegated to Limbo" (242).

Against the people of Leuke, the ordinary conventionalists, came these Philistines, the militant Realists. Naturally the Philistines conquered, and the people of Leuke were condemned to death. Jurgen's wife, the little hamadryad whose life was bound up with that of her tutelary tree (215) perished with its felling. The Philistine Queen took a fancy to Jurgen, but he, "coming of morbid ancestry" (247) declined to abide in Philistia; and so they sent him to the limbo which they call Hell (250).

A better fate befalls the allied city of Pseudopolis. There live those of the Grecian spirit, of that spirit of Hellenism which, according to Matthew Arnold, wars always with the genius of Philistia. There abides Helen of Troy. Her Jurgen sees (224-9) the occasion being much the same as that which is pictured in Keats' "St. Agnes Eve". These people the Philistines could not slay, for

"when the Philistines shouted in their triumph, Achilles and all they who served him rose from the ground like gleaming clouds and passed above the heads of the Philistines, deriding them" (231). But Jurgen and the people of ordinary conventionality perished, and thus our next view of Jurgen finds him in Hell.

The Hell to which he has gone is the Hell of his forefathers, being in truth but a monument to their egotism. They built it "out of the pride which led them to believe that what they did was of sufficient importance to merit punishment" (253). There Jurgen sees his father standing calmly in the midst of an especially tall flame, and very well satisfied with it, because of his confidence that he is important enough to deserve a special place in Hell. Therefore he is angry when the attendant devil does not sufficiently tend his furnace (254, 260-7).

It is not obscene, at least at common law, to speak lightly of Hell. If it were otherwise a great many books would be condemned. Every lawyer knows what was said about Lord Hatherley, when he, sitting in the Privy Council, held that the calvinistic idea of Hell was not part of the religion of the Church of England. It was said that Lord Hatherley had dismissed Hell with costs and had deprived thousands of their hope of everlasting damnation. Nor is it obscene to represent that there are people whose sense of personal importance

rules even in death, people who think that their sins are greater than the sins of anybody else, not because of their quality as sins but because of the persons who commit them. And, pausing yet further at this point, let us suggest that if it is lewd to make fun of Philistia, then all of Matthew Arnold's books should be burned by the hangman; and certainly Whistler's book, "The Gentle Art of Making Enemies", should never have been allowed in public print. Indeed it was Arnold, the father-in-law of a late most respectable member of this Bar, who invented the term Philistines as used in the present connection. Mr. Cabell has simply put in another form the protest that can be made against this point of view. At least it is open to protest.

Of course, we may not be able to agree with all of Mr. Cabell's classifications as to what pertains to Philistia. Many of us are citizens of that country without knowing it. But it is not obscene or lewd for some one else to call us Philistines because of the views we may happen to hold dear. Legally we cannot object; practically we conserve our energies by not doing so. Like the famous Bishop Bonner of Queen Mary's time, we may do well to laugh at the caricatures which the heretics make of us.

With this in mind we might get enjoyment out of Jurgen's observations as to the real issue between Heaven and Hell. The war between them is not as Milton saw it. Rather, the war is between au-

tocracy and democracy; and Hell is fighting to make the universe safe for democracy (287). Everybody knew how Satan came to be the chief magistrate of Hell, he was elected to that office, and he has continued in office so long simply because elections are inadvisable in war time (278-9). And while Hell used vigorous methods against dissenters, that was only because of necessary war time legislation (278-9). But Heaven was indisputably an autocracy, because nobody knew how God derived his power. He had been there through the ages, and He proposed to have no successor (286). Such, then, was the issue. Of its outcome, the shrewd Jurgen was inclined to favor Heaven, because of its superior military efficiency (287). And so, although Jurgen's friends in Hell try to dissuade him (288), although he has married in Hell a vampire who is quite conventional, and life there is conventional also—"Hurry", says his wife, "for we are spending the evening with the Asmodeuses" (277)—Jurgen leaves Hell and visits Heaven.

At that moment the mood of the author changes. Jurgen ascends to Heaven leaving irreverence behind, and the pictures now uncovered are of different tone and motive. The first person whom he sees is a little boy who was once Jurgen himself. When Jurgen meets God he says, "Once very long ago I had faith in you"; to which the reply is, "No, for that boy is here with me as you yourself have seen, and today there is nothing remaining of him anywhere

in the man that is Jurgen" (297).^{*} Heaven contains children, mothers and grandmothers. Logic cannot lead one to it, because logic does not exist there. Therefore, children, mothers and grandmothers can ascend to Heaven where people like Jurgen cannot. Taking Heaven as an illusion, Jurgen finds none of his own illusions there, and hence he must "return to such illusions as are congenial, for one must believe in something" (306). And yet he has stood motionless for thirty-seven days in that place, "forgetful of everything save that the God of his grandmother was love" (306-7). Nobody else, he is told, has willingly turned away so soon, and it is supposed that this is due to some evil wrought in the Nessus shirt he was wearing, the like of which was never seen in Heaven (307). And finally this wayfarer, this man of modern philosophy, says that he turned away from Heaven because he seeks for justice and he cannot find it in the eyes of God, "but only love and such forgiveness as troubled him" (307). To which archangels reply that because of that very fact he should rejoice (307).

If that is obscene, then "The Little Flowers" of St. Francis D'Assisi should at once be suppressed by Mr. Sumner. If it is lewd to teach that none of us would go to Heaven if we had justice done

^{*} It would be impossible to go further except by quoting all (290-308). It should be read.

us, Christianity once more should betake itself to the catacombs.

We are let down from these heights by way of an interview between Jurgen and St. Peter. The Saint has something to say about prohibition (311-313) with which, theoretically speaking, many might disagree. But as the defendants are not indicted under the prohibition laws, it is needless to go into this discussion. The Saint also represents Heaven as pacifistic (312-313); but Mr. Cabell wrote after the Armistice, and pacifism is not, legally speaking, obscene or lewd, whatever else it undoubtedly is.

The travels of Jurgen now draw near to their end, the rest of the book simply rounding out the ideas suggested. Returning to earth, he meets once more the earth goddess Sereda, and the pith of their talk is the conclusion, not that "there is no meaning in anything",—that, both agree, nobody really could face,—but that the lower god, Koshchei, who made things as they are, "is in turn the butt of some larger jest, * * * that all of us take part in a moving and a shifting and a reasoned use of things * * * a using such as we do not comprehend and are not fit to comprehend" (317). The quest of Jurgen ends, fitly enough, with a return to this lower power (329), this power that made things as they are, but is controlled, however rebellious, by a higher force beyond him (333).

We then have a return, in pageant form, of the

women with whom, in this year of pilgrimage just ended (319), Jurgen has foregathered. First there is Guenevere (335) who is now ready to be his wife, Arthur being gone into Avalon and Lancelot being turned monk (335); Anaitis follows (340), then Helen of Troy (345). But all of them he refuses. "For I am transmuted by time's handling. I have become the lackey of prudence and half measures" (348). Then appears to him his wife (350) who disposes of Koshchei "casually, for she believed him to be merely Satan" (353). After ordering Jurgen to be sure to be home in time for supper and to stop on the way to get a half pound of butter, she passes out "neither as flame nor mist, but as the voice of judgment" (355). Jurgen follows her (356), but on the way he sees Dorothy, Dorothy as she is and not as she had lived in either memory or imagination (364). He arrives home recollecting that he had forgotten to do the errand his wife told him to perform, but reflecting that after all things were just about as well with him as could be. He has his wife, he has his business, and the god of things as they are has probably dealt with him very justly. "And probably his methods are everything they should be; certainly I cannot go so far as to say that they are wrong; but still at the same time—Then Jurgen sighed and entered his snug home" (368).

Doubtless we have erred in many ways in our interpretation of the book under attack: we are

quite sure that we have not done it justice. After all, it must speak for itself, for everyone has his own reading of whatsoever comes to his notice. But of one thing we are sure, that it fills the test of literature as distinct from pornography; that it has a theme, sustains a thought, criticises life. *It attempts, among other things, to show the futility of escaping from conventionality by way of seeking sin, for sin itself has its conventions. It pictures sin in this spirit, and in doing so it perforce speaks of sin.* But it must be judged as a whole, not by a sentence here, or even by a page there (*Halsey v. N. Y. Society*, 234 N. Y. 1). And, as decided in the case just cited, a publication can be lawful even if it should happen to contain indecent passages.

6—The passages, to which reference has been made in the complaint originally filed in Special Sessions, are not indecent.

We submit that, having in mind the context, there is nothing in "Jurgen" which is indecent. A man studiously on the alert for the indecent can put his finger on certain words in the book; but the very meaning of these words is decent if we will but read them in the connection to which they are meant to refer. And other things that are said, so far from being indecent, are things lawfully to be said, unless the body of our literature should perish from the earth.

All of this is illustrated by the bill of particulars which Mr. Sumner, one of the prosecutors in this case, furnished when he filed a complaint in the Special Sessions. Mr. Sumner there enumerates the pages containing, as he thinks, lewd and obscene matter. We shall now deal with the particulars thus furnished.

What is there to complain of on pages 59, 88, 99, 114, 134-5, 275? Pages 88 and 99 require no discussion. On pages 134-5 Guenevere takes leave of Jurgén, that is all. On page 59 occurs "temptress", which is not obscene. On page 114 the ghost of Smoit tells Jurgén that he is his grandfather, instead of the putative ancestor whom Jurgén had always accepted. But if this is lewd, then we must stop the sale of such books as Thackeray's "Henry Esmond". On page 275 Jurgén stops his vampire wife from sucking his blood through biting his chest. Burne-Jones' painting "The Vampire", is familiar,—even to those of us who never frequent galleries at home or abroad,—through Kipling's famous poem.

But as perhaps it is not suitable thus to summarize the particulars which Mr. Sumner was at such pains to gather, we will take the other pages which he mentions and deal with them *seriatim*.

Pages 57-8—Jurgén's conversation with Dorothy in the garden. A kiss is not indecent. Temptation came, but it was dispelled.

Page 61—Reference to "the bed" is made—But

for whom? The bride. A bridal bed is not obscene or lewd. *Vide* wedding march in "Lohengrin", and the relative chapters in Scott's "The Bride of Lammermuir".

Page 63—"Had wondered if he were really the first man for whom she had put a deceit upon her husband", etc. If this is obscene, then nearly all current fiction is, to say nothing of the classics, ancient or modern.

Page 64—Jurgen counts up his conquests. But so did Don Juan. "The end of all is death"—but so said Villon—"Ou sont les nieges d'antan?"

Page 67—Speaks simply of a kiss. Whether long or short, a kiss is not lewd.

Page 80—Jurgen is talking about Guenevere to her father—"I can get justice done me anywhere, in all the bed chambers of the world." If this is lewd, then we should abolish Ophelia's mad song in Hamlet. Anyhow, Jurgen goes on to say (same page) "I only meant in a manner of speaking, sir."

Pages 84-6—Jurgen tells Yolande she must reward him by candle light, etc. This contains no description of any offensive act. There is nothing explicit.

Page 89—Guenevere's father suspects that she was not entirely chaste while in the giant's cavern. Has literature, ancient or modern, never previously exposed a father's doubt of his daughter's chastity? Did no one ever study the Greek tragedies?

Page 90—The King wonders whether "a thing

like this is happening" in his city in many places, and Jurgen says that it probably is. Sinclair Lewis has similar speculations in "Babbitt". The references to a "breakage" refer to infractions of moral law.

Page 92—The King says that, if Jurgen has had improper relations with Guenevere, he should lie like a gentleman. Where is the obscenity? Has not that phrase become time-worn, in literature and conversation, since the late eighties?

Page 98—Jurgen looks forward "to more intimate converse" with the lady. Entirely compatible with just what it says. The dreadful word "liaison" also is used. But the late war has brought it into such use—"liaison officer"; "liaison between the Y. M. C. A. and the chaplains' corps", etc.—that the word now has *Anglice* the extensive meaning that the French always allowed it.

Pages 100, 102, 104-8—These deal with Jurgen's affair with Guenevere. If read as a whole, bearing in mind the outstanding point, that Guenevere's characteristic was "her innocence, combined with a certain moral obtuseness" (108) there is nothing lewd or obscene in this any more than in Hardy's "Tess of the D'Urbervilles". Reference may be made to page 102, where Jurgen had his answer to the question, what sort of service did women most cordially appreciate. He believed they did not really desire to be served as (103) a symbol of Heaven's

perfection, as (336) half goddess, half bric-a-brac. But this opinion was not suitable for a mixed audience in Glathion, where people believed otherwise (104-108). They are not said to have done anything but kiss and talk. The reasons for their talking in privacy are logical. If any improprieties took place the text nowhere alludes to them. Compare the first part of Goethe's "Faust," Scott's "The Heart of Midlothian," George Eliot's "Adam Bede" and "Middlemarch," or Stevenson's "Weir of Hermiston," for precisely similar seductions.

Page 120—Jurgen gets into the bedroom of the Bishop. "His eminence was not alone, but as both occupants of the *apartment* were asleep, Jurgen saw nothing unepiscopal".—If we are to be literal, then let us observe that this passage does not say (a) that the other was a female; (b) that they were in bed together. Sterne's "Sentimental Journey" has passages much more explicit.

Page 144—Jurgen talks concerning Guenevere and Lancelot. Tennyson, in verse, discoursed of the same thing.

Pages 161-8—Deal with Jurgen's matrimonial quarrels with Anaitis, who, for all she is a nature myth and believes in symbolism, is quarrelsome. She does not like Jurgen to "talk so flippantly about her religion" (165) and regrets his dislike of his "in-laws", such as Apis, the well-known Egyptian god, who "will go about in public wearing

a bull's head". What is lewd or obscene here? Surely not the terms "sacti-sodhana" and "mun-trus". They may look obscene because they are in an unfamiliar language, but in that language, Sanscrit, counsel are informed, they refer to religious rites of the Brahmins, who are not commonly rated as lewd.

Pages 170-1—Shows that nature myths last only as long as the philologists let them, hence they are Epicureans. But Jurgen, being a doubter, is not sure that death ends all. Is there anything lewd or obscene in this quaint turning of the tables on the materialists?

Pages 174-7—Continues the matrimonial life of Jurgen and Anaitis, ending with the conviction, forced on him, that the ruling spirit of this land of hers is nothing else but Cybele, the Roman goddess of earth, or Æsred, or Sereda, as she is variously called. And so he became convinced "that all such employment was a peculiarly unimaginative pursuit of happiness" (177). Surely a good moral lesson, if anything.

Page 186—Simply a symbolic way of telling us that "Time begets nothing". He sleeps in Atlantis, while Briareus watches. Life is a ceaseless round, history is a ceaseless round, of old things. It is a commonplace of Greek mythology that Chronos, [Time] was mutilated by his son Zeus.

Pages 186, 321, 154—Carry reference to the fact

that there are such things as eunuchs. If it is wrong to refer to eunuchs, then most literature, not only of the East, but referring to it, should be expunged. St. Philip's first convert was an eunuch (Acts VIII, 26-40). In "Innocents Abroad" Mark Twain gives the story of the revenge which Heloise's uncle caused to be taken upon Abelard.

Page 211—Refers to the priests of Cybele. If they were eunuchs, that would not be, as said above, an obscene fact. But they were not eunuchs, as it happened. The priests of Cybele were madmen: that is, they had been deprived of their wits, and had thus "parted with possessions which Jurgen valued". Above all things the practical-minded Jurgen valued sanity. See Tooke's "Pantheon," p. 172: "The Priests of Cybele were named Galli, from a river of Phrygia. Such was the nature of the water of this river, that whoever drank of it immediately grew mad. The Galli, as often as they sacrificed, furiously cut and slashed their arms with knives; and thence all furious and mad people were called Galantes."

Pages 196-200, 203, 206-7, 124-8, 148-150—*References to objects:*—

(a) Jurgen's staff (196-200, 203). The answer to this, like the answer to the insinuations about the lance in chapter 22 (*vide supra*) is that it was a staff, and nothing else (see p. 95).

(b) Harpocrates, "who held an astonishing object" (206-7). This is attacked along with the reference to the People of the Fields, who practise eudæmonism. Jurgen sees the People of the Fields, "who dwell between the forest and the city of Pseudopolis (204). These people "did one and all what they had always done" (204) whereas, "whoever heard of the People of the Wood doing anything useful?" So Jurgen, after being informed that the People of the Field never take a holiday (206) decides to see what the People of the Wood do about it (206). He finds them practicing eudæmonism outdoors instead of indoors. Eudæmonism: "The type of utilitarian ethical theory that makes the pursuit, enjoyment and production of happiness the supreme end in moral conduct."—Funk & Wagnalls' Dictionary. This was of course the creed of Cocaigne—"Eat, drink, and be merry, for tomorrow we die." The point here is that satyrs do not go indoors, for the reason that for a satyr to go indoors is unheard of. If it is indecent to mention a satyr, then not only should Keats and Swinburne be destroyed, but Elizabeth Barrett Browning should be reprimanded for writing that poem "A Musical Instrument", which is all about "The Great God Pan", chief of Satyrs. As to Harpocrates, we refer to Tooke's "Pantheon of the Heathen Gods",—a most respectable authority. It is there said (p. 352): "The Egyptians worshipped Harpocrates as the god of

Silence * * * They consecrated the tree persea to him; because the fruit was like a heart * * * He was painted with a finger upon his lips, thereby commanding silence." It is, therefore, probably the persea fruit which Harpocrates is carrying, and the astonishment of Jurgen at seeing the human heart thus publicly displayed is equally nature and good allegory. The custom that led to stiffness was of course Harpocrates' custom of not speaking to or answering the remarks of others.

(c) Jurgen's sword (124-8, 148-150). Mention is made of Jurgen's sword. But, like the staff and the lance (*vide supra*) all that need be said is that it really is a sword, Caliburn. The book tells just where and how he got it (72, 76).

(e) The doorknocker on the entrance to Cocaigue (150). These were simply the nude figures of Adam and Eve. Jurgen, being conventional, and yet seeking sin, is embarrassed at the nude, and thinks it is indecent; so he talks about it.

Pages 196-200, 203—Jurgen's meeting, and marriage, with Chloris, the Hamadryad. There is nothing in this does not bear comparison with the "Endymion" of Keats, or the Chorus from Swinburne's "Atalanta in Calydon". As to the marriage, see two books in common publication:—Flaubert's

"Temptation of St. Anthony," Modern Library, p. 226: "These are the deities of marriage. They await the coming of the bride. Domiduca should lead her in,—Virgo unfasten her girdle,—Subigo place her in the bed,—and Praema open her arms, and whisper sweet words into her ear." Tooke's "Pantheon of the Heathen Gods, Adapted for the Use of Students of Every Age and of Either Sex," p. 281: "Jugatinus joined the man and the woman together in the yoke of matrimony. Domiducus guided the bride into the bridegroom's house * * * Priapus, or Mutinus, was also reckoned one of the nuptial gods, because in his lap the bride was commanded to sit."

Pages 271-2, 286—The marriage with the vampire goes no further than passages in Sterne's *Sentimental Journey* and the novels of Fielding. The conversation of the vampire leaves things unsaid rather than said. There is no reason for taking in a wrong sense the reference to the sceptre.

Pages 236-9, 241-2. Jurgen's conversation with the Queen of Philistia is nothing but a take-off on the mediæval—occasionally modern—belief in the magic of numbers. See Baring-Gould's "Curious Myths of the Middle Ages," Appendix E, p. 651: "Pythagoras taught that each number had its own peculiar character, virtue and properties. The unit, or the monad, he says, is the principle and the end

of all; it is this sublime knot which binds together the chain of causes; it is the symbol of identity, of existence, of conservation, and of general harmony * * * The number Two, or the dyad, the origin of contrasts, is the symbol of diversity, or inequality, of division, and of separation. Two is accordingly an evil principle, characterizing disorder and confusion * * * THREE, or the triad, is the number containing the most sublime mysteries, for everything is composed of three substances * * * NINE, or the ennead, being the multiple of THREE, should be regarded as sacred. Finally, TEN, or the decad, is the measure of all, since it contains all the numeric relations and harmonies." "Eight (p. 652) is the number of the Beatitudes."

Pages 340-3—contain nothing but a statement of the fact that Venus, as a cult, has her followers and her temples,—nothing that poets of times past have not told us again and again. The temples existed, and are mentioned freely in all books of classical mythology.

We are almost at the end of Mr. Sumner's particulars; but there are two that deserve notice.

He finds obscenity on pages 228-9. There we find Jurgen standing at the bed of the sleeping Helen, but leaving her untouched, because he wants to retain his "unreasonable dreams". If this is obscenity, then indeed Keats wrote in lewdest mood the "Eve of St. Agnes".

And Mr. Sumner finds obscenity on page 142. What do we find there? We find Jurgen kneeling before a crucifix!

And there let us leave the case.

7—*In conclusion.*

No book, no matter by whom it is written, should be read without an appreciation of the motive of its writing. It is the embarrassment of a case such as this, that the very fact of an indictment, the notoriety attending it, makes it difficult to sit down to the reading with the frame of mind that is present when we take a book from a library shelf. However one may attempt to resist it, there is always present a certain feeling, if somebody has said that the book is indecent. That suggestion can influence minds, even the most philosophical. In Lord Haldane's most recent book, "The Philosophy of Humanism" (p. 75), he quotes from the memoirs of the great German philosopher, Hegel, as illustrating how suggestion can lead to conceptions:—

"In my youth I remember hearing a city magistrate complain that book writers were going too far, and trying to rout out Christianity altogether. Some one, it appeared, had written a defense of suicide. It was horrible, too horrible! On further inquiry it turned out that the book in question was 'The Sorrows of Werther'."

The last resort against this influence of suggestion is now made. The book is submitted to this court for judicial scrutiny, guided by the tests of the law.

Dated October 16, 1922.

Respectfully submitted,

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DECISION OF JUDGE CHARLES C. NOTT
IN PEOPLE VS. HOLT, McBRIDE
& CO., ET AL

PEOPLE

VS.

HOLT, McBRIDE & Co. ET AL.

The defendants herein, at the close of the People's case, have moved for a direction of acquittal and the dismissal of the indictment on the ground that the book "Jurgen" on the possession of which the indictment is based, is not an "obscene, lewd, lascivious, filthy, indecent or disgusting book" within the meaning and intent of section 1141 of the Penal Law, for the alleged violation of which the indictment has been found.

I have read and examined the book carefully. It is by Mr. James Branch Cabell, an author of repute and distinction. From the literary point of view its style may fairly be called brilliant. It is based on the mediæval legends of Jurgen and is a highly imaginative and fantastic tale, depicting the adventures of one who has been restored to his first youth but who, being attended by a shadow in the guise of the shadow of his old self, retains the experience and cynicism of age which frustrates a perfect fulfillment of his desire for renewed youth.

The adventures consist in wanderings through mediæval and mythological countries and a sojourn in Hell and Heaven. He encounters beings of mediæval folk-lore and from classical Mythology. The most that can be said against the book is that certain passages therein may be considered suggestive in a veiled and subtle way of immorality, but such suggestions are delicately conveyed and the whole atmosphere of the story is of such an unreal and supernatural nature that even these suggestions are free from the evils accompanying suggestiveness in more realistic works. In fact, it is doubtful if the book could be read or understood at all by more than a very limited number of readers.

In my opinion the book is one of unusual literary merit and contains nothing "obscene, lewd, lascivious, filthy, indecent or disgusting" within the meaning of the statute and the decisions of the courts of this state in similar cases. (See *Halsey v. New York Society*, 234 N. Y. 1; *People v. Brainard*, 192 App. Div. 116; *St. Hubert Guild v. Quinn*, 64 Misc. 336.)

The motion, therefore, is granted and the jury is advised to acquit the defendants.

STATUTES RELATING TO THE PUBLICA-
TION, SALE, ETC., OF OBSCENE
LITERATURE

NEW YORK STATUTES

PENAL LAW—SECTIONS 1141 AND 1143

SEC. 1141. *Obscene prints and articles.* 1. A person who sells, lends, gives away or shows, or offers to sell, lend, give away, or show, or has in his possession with intent to sell, lend or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, lascivious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene,

indecent or immoral, or other lewd, obscene, indecent or immoral drawing, image, article or object, or who shows, advertises or exhibits the same, or causes the same to be shown, advertised, or exhibited, or who buys, owns or holds any such machine with the intent to show, advertise or in any manner exhibit the same; or who,

2. Prints, utters, publishes, sells, lends, gives away or shows, or has in his possession with intent to sell, lend, give away or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; or who,

3. In any manner, hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, or any of them.

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days nor more than one year imprisonment or be fined not less than fifty dollars nor more than one thousand dollars or both fine and imprisonment for each offense.

SEC. 1143. *Mailing or carrying obscene prints and articles.* A person who deposits, or causes to be deposited, in any post-office within the state, or places in charge of an express company, or of a common carrier, or other person, for transportation, any of the articles or things specified in the last two sections, or any circular, book, pamphlet, advertisement, or notice relating thereto, with the intent of having the same conveyed by mail or express, or in any other manner, or who knowingly or wilfully receives the same, with intent to carry or convey, or knowingly or wilfully carries or conveys the same, by express, or in any other manner except in the United States mail, is guilty of a misdemeanor.

